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Arizona Corporation Commission
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MAY 16 2005

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Mining Company, Arizonans for
Electric Choice and Competition
and ASARCO Incorporated.

BEFORE THE ARIZONA CORPORATION COMMISSION

IN THE MATTER OF THE GENERIC
PROCEEDING CONCERNING
ELECTRIC RESTRUCTURING ISSUES

DOCKET NO. E-00000A-02-0051

IN THE MATTER OF ARIZONA PUBLIC
SERVICE COMPANY'S REQUEST FOR
A VARIANCE OF CERTAIN
REQUIREMENTS OF A.A.C. R14-2-1606

DOCKET NO. E-01345A-01-0822

IN THE MATTER OF THE GENERIC
PROCEEDING CONCERNING THE
ARIZONA INDEPENDENT
SCHEDULING ADMINISTRATOR

DOCKET NO. E-00000A-01-0630

IN THE MATTER OF TUCSON
ELECTRIC POWER COMPANY'S
APPLICATION FOR A VARIANCE OF
CERTAIN ELECTRIC COMPETITION
RULES COMPLIANCE DATES

DOCKET NO. E-01933A-02-0069

**AECC RESPONSE TO TUCSON
ELECTRIC POWER COMPANY'S
MOTION FOR DECLARATORY
ORDER AND REQUEST FOR
PROCEDURAL CONFERENCE**

Arizonans for Electric Choice and Competition, Phelps Dodge Mining Company and ASARCO, Inc. (collectively "AECC"), through undersigned counsel, hereby files this Response to Tucson Electric Power Company's ("TEP") Motion for Declaratory Order ("Motion") and Request for Procedural Conference in the above-captioned matter.

INTRODUCTION

While AECC agrees that the Arizona Corporation Commission ("Commission") should revisit issues concerning the status of the Retail Electric Competition Rules ("Rules") – especially in light of Commission decisions concerning electric restructuring

1 since the approval of the 1999 TEP Settlement Agreement in Decision No. 62103, as well
2 as the Arizona Supreme Court's recent denial of the Petition for Review in *Phelps Dodge*
3 *v. Arizona Corporation Commission*, 207 Ariz. 95, 83 P.2d 573 (App. 2004) – AECC
4 asserts that this rate proceeding is not the proper forum for such a wide-scale review. In
5 fact, the Commission has already ordered its Staff to open a rulemaking docket to review
6 the Rules in light of its "Track A" Order in Decision No. 65154 (September 10, 2002).
7 See Decision No. 65154 at 32-33.

8 AECC supports the 1999 TEP Settlement Agreement. However, the "uncertainty"
9 surrounding the Commission's future treatment of TEP's generation assets after the
10 expiration of the 1999 TEP Settlement Agreement has already been answered in the
11 Commission's Track A Order. It thus appears that a declaratory order is unnecessary.
12 This observation notwithstanding, AECC does not object to TEP receiving clarification
13 from the Commission on this matter. However, AECC cannot support TEP's request to
14 address much larger, industry-wide issues (e.g. state of the Rules) in this docket, nor does
15 AECC agree that any uncertainty exists with respect to the Commission's regulatory
16 treatment of TEP's generation assets.

16 DISCUSSION

17 1. The Commission Has Already Ordered a Generic Review of the Rules.

18 In its Track A Order, the Commission determined that a rulemaking proceeding "to
19 review the Retail Electric Competition Rules in light of our decisions herein and to
20 address issues resolved in Track B, and to amend A.A.C. R14-2-1615(A), A.A.C. R14-2-
21 1606(B), and A.A.C. R14-2-1611(A) should be initiated immediately." See Decision No.
22 65154 at 32-33. While it has been over two-and-a-half years since the Track A Order¹,
23 events have transpired, including Arizona Public Service Company's ("APS") agreement
24 to withdraw its legal challenge of Decision No. 65154, that warrant the immediate
25 initiation of a rulemaking proceeding to consider the status of the Rules. However, this

26 ¹ Arizona Public Service Company appealed Decision No. 65154. This litigation will be withdrawn as part of the
2004 APS Settlement Agreement approved by the Commission earlier this year.

1 review must be broad; TEP is not the only entity, regulated or unregulated, that must
2 formulate a business strategy based upon the Commission's policies toward electric
3 restructuring and competitive markets. As TEP recognized, these broader issues are more
4 appropriately addressed in the Commission's generic docket on electric restructuring.
5 AECC therefore joins TEP in urging the Commission to address the status of its Rules, but
6 not within the specific context of how TEP's generation assets will be treated post-2008.

7 2. There Is No Uncertainty Surrounding the Commission's Treatment of TEP's
8 Generation Assets after 2008.

9 In its Track A Order, the Commission was very clear that the public interest
10 required "the suspension of A.A.C. R14-2-1615(A), as amended by Decision Nos. 61793
11 and **62103**, and further, to prohibit the transfer of generation assets." See Decision No.
12 65154 at 32. In support of its request for a declaratory order, TEP asserts that "The TEP
13 1999 Settlement Agreement was negotiated under the foundational premise that TEP's
14 generation assets would remain deregulated and market-based beyond the CTC's
15 termination in 2008." See Motion at 2. However, TEP was, or should have been, fully
16 aware of the ramifications that the Commission's Track A Order would have on this
17 "foundational premise," at that time, yet TEP chose not to challenge or appeal the
18 decision. Furthermore, the Commission specifically provided in its Track A Order that
19 should APS or TEP wish to pursue divestiture, they "should file applications to that effect
20 for Commission consideration." See Decision No. 65154 at 23.

21 TEP also asserts that its generation service rates are currently "market-based"
22 rather than being based on traditional cost of service ratemaking principles. To clarify,
23 Section 4.1 of the Settlement Agreement specifically states that "TEP's rates shall be fully
24 unbundled into separate charges for:...(h) standard offer generation, the sum of which
25 shall not exceed a customer's current bundled rates." Because standard offer generation
26 was calculated using cost-of-service standards at that time, TEP's standard offer rates
reflect traditional cost-of-service principles. Notwithstanding this clarification, AECC

1 supports TEP's request for a declaratory order concerning the post-2008 treatment of the
2 Company's generation assets, provided it is consistent with past decisions regarding
3 divestiture and market-based rate authority.

4 CONCLUSION

5 Based on Commission precedent, as well as the arguments expressed herein,
6 AECC respectfully requests that the Commission: 1) deny, in part, TEP's Motion for a
7 Declaratory Order on the status of the Retail Electric Competition Rules in *this*
8 proceeding; and 2) initiate a separate and independent rulemaking docket to address the
9 status of the Retail Electric Competition Rules, consistent with Decision No. 65154.

10 RESPECTFULLY SUBMITTED this 16th day of May, 2005.

11 FENNEMORE CRAIG, P.C.

12 By: 

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18 foregoing hand-delivered for filing
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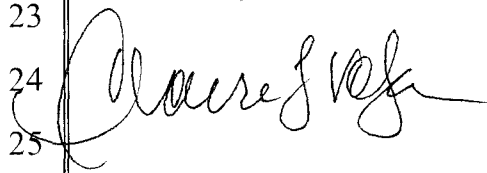
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